No. 89-699

In the Supreme Court of the United States

OCTOBER TERM, 1989

COLORADO DEPARTMENT OF REVENUE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether under 21 U.S.C. 881(a) (1976 Supp. V 1981), proceeds of a narcotics transaction were forfeited to the United States as of the date of the act giving rise to forfeiture, thereby defeating the State's subsequent claim against those funds to satisfy the wrongdoer's unpaid state taxes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 873 F.2d 242. The opinion of the district court (Pet. App. 16-44) is reported at 636 F. Supp. 1312.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1989, and a petition for rehearing was denied on August 2, 1989. Pet. App. 45-46. The petition for a writ of certiorari was filed on October 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 21, 1982, police officers in Lakewood, Colorado, who were investigating drug trafficking, executed

a warrant for the search of a house owned by Albert and Victoria Levy. In the course of the search they seized 12 gold bars and approximately $1.5 million in currency. It is undisputed that the gold and currency were the proceeds of a cocaine transaction. Pet. App. 3, 19.

On December 2, 1982, the State of Colorado, through the local district attorney, commenced a nuisance action in state court under state law seeking forfeiture of the currency.[1] Thereafter, on December 22, 1982, the State of Colorado, through petitioner Department of Revenue, assessed taxes totalling approximately $194,000 against Albert Levy based on narcotics sales of almost $3 million in 1982. Those assessments were in the amounts of $115,880 for state sales taxes, $58,677 for state income taxes, and $19,313 for Regional Transportation District (RTD) taxes. On December 23, 1982, a notice of lien for the state taxes and warrant of distraint were filed in state court, and on the same date, the state court entered judgment in petitioner's favor for $194,000 in state taxes. Pet. App. 3-4, 20, 21.

Also on December 23, 1982, the United States filed a civil forfeiture action against the currency in the United States District Court for the District of Colorado, pursuant to 21 U.S.C. 881(a)(6) (1976 Supp. V 1981).[2] On January 3, 1983, the district court issued a warrant for arrest of the currency. On January 5, 1983, the Internal Revenue Service assessed a tax liability of $1,962,563 against Albert Levy, pursuant to 26 U.S.C. 6851(a), and notices of federal tax liens against all property of Albert Levy were filed on

[1] The state nuisance action was dismissed on January 14, 1983, refiled on January 26, 1983, and dismissed again on May 29, 1984. Pet. App. 35.

[2] Section 881(a)(6), providing for forfeiture of all property furnished or intended to be furnished in exchange for a controlled substance, was enacted in 1978. See Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(a), 92 Stat. 3777.

January 24 and 25, 1983. The United States filed a civil forfeiture action against the gold bars on March 11, 1983, and the district court issued a warrant for the seizure of the gold bars on March 14, 1983. The clerk of the district court was appointed custodian of the currency and gold bars on March 25, 1983. Pet. App. 4, 21-23.[3]

In the civil forfeiture proceedings brought by the United States, claims were also filed against the res by other parties, including the IRS and the State of Colorado. The State's claims against the currency were based both on its pending forfeiture action under state law and on its claim (through petitioner Department of Revenue) for unpaid state taxes. The United States asserted (1) that under Section 881, forfeiture of the currency and gold bars to the United States took place upon the occurrence of the acts giving rise to forfeiture, and that the Levys thereafter retained no interest in the property that could be the subject of petitioner's (or the IRS's) tax assessments; and (2) that, in the alternative, the federal government's claims for unpaid federal income taxes took precedence over all other claims except those of petitioner. Pet. App. 24-25.

The district court rejected the United States' claim of paramount title to the currency under Section 881, concluding that forfeiture to the United States would become effective only upon entry of a judgment of forfeiture, which would not relate back to the commission of the underlying offense. Pet. App. 37-38. The court accordingly ordered that the res be allocated to satisfy the state and federal tax claims. In this regard, the court sustained petitioner's claim for state income taxes but rejected its claim for sales and RTD taxes,

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[3] On January 26, 1984, Albert Levy pleaded guilty to one count of conspiracy to defraud the United States by evading and defeating the collection of taxes on the income derived from illegal distribution of cocaine, in violation of 18 U.S.C. 371. Pet. App. 23.

explaining that the latter taxes may be assessed only on retail transactions and there was no evidence here that the transactions were anything other than wholesale. *Id.* at 38-39. The court held that the balance of the res should be allocated in partial satisfaction of the Levys' unpaid federal taxes, concluding that the federal tax lien took priority over the State's claim based on forfeiture under state nuisance law—especially since that claim was dismissed by the state court on May 29, 1984. *Id.* at 29-37; see note 1, *supra*.[4]

[4] The State did not appeal the district court's rejection of the State's claim, through the district attorney, based on forfeiture under state law. The court of appeals would have had no occasion to address that issue in any event, because the court of appeals sustained the United States' claim based on forfeiture of the property as of the date of the commission of the act giving rise to forfeiture, which was prior to the State's seizure of the currency (the triggering date for forfeiture under state law). See page 5, *infra*. For this reason, no issue concerning the priority of any claims based on the possibility of forfeiture under state nuisance law is properly presented in this Court by petitioner Department of Revenue.

In addressing the state-law forfeiture claim, the district court recognized (Pet. App. 29-32) that the Colorado Supreme Court had ruled, in response to a question certified to it by the federal district court in another case (*United States* v. *Wilkinson*, 628 F. Supp. 29 (D. Colo. 1985)), that under Colorado law, the State's interest in property under the nuisance law vests upon seizure of the property, that a final order of forfeiture in a nuisance action relates back to the time of seizure, and that an individual therefore retains no interest in the property after the seizure. *In re Interrogatories of the U.S. District Court: United States v. Wilkinson*, 686 P.2d 790 (Colo. 1984). But the district court reasoned in the instant case that the individual does not lose all rights to seized property immediately upon seizure, since the state court might not order the property forfeited, and the United States' tax lien therefore may attach during the period prior to judgment. For this reason, and in light of the priority of federal tax liens under the Supremacy Clause, the court held that the federal tax lien is entitled to priority over the State's forfeiture claim. Pet. App. 34-37. The Tenth Circuit subsequently sustained this view of the interaction of state forfeiture law and federal tax law in *United States* v. *Wingfield*, 822 F.2d 1466, 1472-1475 (1987), cert. dismissed, 486 U.S. 1019 (1988), which was a companion case to

2. The United States appealed the district court's order insofar as it declined to order forfeiture of all the property to the United States under Section 881. The court of appeals reversed the judgment of the district court and remanded with directions to enter an order of forfeiture in favor of the United States. Pet. App. 1-15.[5] The court of appeals held that under 21 U.S.C. 881(a)(6) (1976 Supp. V 1981), the United States' right to the proceeds of drug trafficking vested at the time the unlawful act was committed, and a judgment of forfeiture therefore related back to the commission of the offense. Pet. App. 7-13. As a result, the court concluded that the title obtained by the United States under the civil forfeiture statute defeated the competing claims to the property. *Id.* at 15.[6]

Wilkinson and which was also discussed by the district court in the instant case. See Pet. App. 32-34.

[5] The district court had not entered a final judgment on the United States' forfeiture claim, presumably because, after satisfaction of the state and federal tax liens, none of the res remained to be ordered forfeited to the United States. Based on the stipulated facts establishing the United States' entitlement to the property, the court of appeals saw no reason why an order of forfeiture should not be entered. Pet. App. 15.

[6] Petitioner also argued that it was an "innocent owner," under 21 U.S.C. 881(a)(6) (1976 Supp. V 1981), of the portion of the proceeds of Levy's drug sales that would be used to satisfy the State's lien for sales taxes, because, under state law, Levy held that portion in trust for the State. The court of appeals rejected this argument, reasoning that because Section 881(a)(6) provided for forfeiture of all property "furnished or intended to be furnished by any person in exchange for a controlled substance," the property was forfeited to the United States while it was still in the hands of the purchaser, when the purchaser manifested an intent to exchange it for the cocaine. Pet. App. 14. Because the property subject to the state sales tax lien therefore was not exempt from forfeiture, the court of appeals had no need to address petitioner's argument, raised in its cross-appeal, that the district court erred in requiring petitioner to show that the drug sales involved were retail, not wholesale, in nature. *Ibid.* Petitioner does not renew that argument here. See Pet. i.

3. On October 20, 1989, the district court ordered the currency and gold bars released to the United States. On December 7, 1989, pursuant to the revenue-sharing provisions of 21 U.S.C. 881(e)(1)(A), the Attorney General authorized the transfer of approximately 90% of the value of the forfeited property to five police and sheriff's departments in Colorado: the Lakewood Police Department (63%); the Jefferson County Sheriff's Department (13.5%); and the Greenwood Police Department, the Aurora Police Department, and the Arapahoe County Sheriff's Department (4.5% each). Compare *Caplin & Drysdale, Chartered* v. *United States*, 109 S. Ct. 2646, 2654 (1989).

ARGUMENT

The court of appeals correctly held that, under 21 U.S.C. 881(a)(6) (1976 Supp. V 1981), the currency and gold bars were forfeited to the United States at the time of the act giving rise to forfeiture, and that petitioner's tax liens therefore did not defeat the United States' claim of title. That holding presents no issue of continuing importance warranting review by this Court, because Congress amended Section 881 in 1984 expressly to provide that the interest of the United States vests at the time of the act giving rise to forfeiture.

1. Petitioner concedes (Pet. 6-8) that Congress may provide for the United States' title in forfeited property to vest at the time of the commission of the act giving rise to forfeiture, and that under such a statute, the entry of an order of forfeiture relates back and defeats all intervening claims, including those of a State for unpaid taxes. As petitioner further concedes (Pet. 6-7), the Court recognized this relation-back principle in *United States* v. *Stowell*, 133 U.S. 1 (1890), and the Court recently reaffirmed that principle in *Caplin & Drysdale* under the parallel criminal forfeiture

provisions of the federal drug laws, 21 U.S.C. 853. The Court noted in *Caplin & Drysdale* that Congress had enacted the so-called "relation-back" provision in 21 U.S.C. 853(c)—which provides that "[a]ll right, title and interest in [forfeited] property * * * vests in the United States upon the commission of the act giving rise to forfeiture"—in explicit reliance on the holding in *Stowell* that forfeiture as of that date operates as a statutory conveyance of the property, valid "against all the world." See 109 S. Ct. at 2653, citing S. Rep. No. 225, 98th Cong., 1st Sess. 200 & n.27 (1983), and quoting *Stowell*, 133 U.S. at 19.

Petitioner's argument therefore is reduced to the proposition that as a matter of statutory construction, under the version of Section 881 in effect in 1982, title to forfeited property did not vest in the United States at the time of the act giving rise to forfeiture and that other parties therefore could acquire an interest in the property at any time before the entry of an order of forfeiture. See Pet. 7-8. In advancing this argument, petitioner relies (Pet. 7) solely on the fact that the introductory clause in Section 881(a) then stated, as it does now, that "[t]he following [property] shall be subject to forfeiture to the United States * * * ." Petitioner points out that the statute in *Stowell* stated that the property "shall be forfeited," rather than "shall be subject to forfeiture," upon commission of the act. In petitioner's view, this difference rendered forfeiture under Section 881(a)(6) merely "permissive" rather than "mandatory," and allowed others to acquire an interest in the property prior to the entry of an order of forfeiture, as the State sought to do here through its tax liens.

The court of appeals correctly rejected this contention. Pet. App. 8-10. The introductory clause in Section 881(a) further states, in language that petitioner fails to quote, that "no property right shall exist" in the subsequently enumerated interests in property that are subject to

forfeiture. As the court of appeals explained (*id.* at 10):

> This language makes clear that property rights are divested immediately at the moment such property is used in a manner or context prescribed by section 881, and not at some future time. The language "subject to forfeiture" is merely used in this statute to give notice of the scope of property that shall be forfeited.

Moreover, as the court of appeals also pointed out, Pet. App. 12, Congress amended Section 881 in 1984 by adding a new subsection (h) that eliminates any doubt on this question. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 306(f), 98 Stat. 2051. Subsection (h) provides that "[a]ll right, title, and interest in [forfeited] property * * * shall vest in the United States upon commission of the act giving rise to forfeiture under this section." This language is essentially identical to 21 U.S.C. 853(c), which was discussed in *Caplin & Drysdale* and which was also enacted by Congress in 1984 as part of the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 303, 98 Stat. 2045. The Senate Report, in explaining the addition of subsection (h), states that the relation-back principle it embodies was already "well established in current law," S. Rep. No. 225, *supra*, at 215, "thus indicating that Congress had intended to apply relation back all along." Pet. App. 12.

For the foregoing reasons, the court of appeals correctly rejected petitioner's contention that its tax liens could defeat the United States' title under the civil forfeiture laws in effect in 1982. In any event, that question is of no continuing importance, in light of Congress's amendment of Section 881 more than five years ago to eliminate any doubt on this score. There accordingly is no merit to petitioner's contention (Pet. 7) that the Court should grant review because the decision below conflicts with *United States* v. *Thirteen Thousand Dollars in United States Currency*, 733

F.2d 581, 584 (8th Cir. 1984). That decision also arose prior to the 1984 amendments, and the circuit conflict has been eliminated by those amendments.

Nor is there a conflict between the decision below and *United States* v. *Francis*, 646 F.2d 251 (6th Cir.) cert. denied, 454 U.S. 1082 (1981), as petitioner suggests (Pet. 8-9). That case did not involve civil forfeiture at all; it addressed an entirely different procedural question. In *Francis*, the defendant's motion for return of property under Fed. R. Crim. P. 41 was denied on the ground that the government no longer had the seized money in its possession, because it had been obtained by the State to satisfy a state tax levy. The district court held that the government, which did not assert any claim to the property, could not return what it did not have, and that the defendant's recourse was to contest the state tax lien in state court. The court of appeals affirmed. Because the United States did not assert any right in the property, neither court based its decision on the notion that the State's right to levy on a defendant's property took priority over the federal government's claim to the property.[7]

2. Contrary to petitioner's contention (Pet. 8, 10-11), the court of appeals' unexceptional application of the settled relation-back doctrine does not prevent petitioner from taxing drug profits, nor does it otherwise interfere with petitioner's taxing authority. The decision below merely bars the State from enforcing its tax laws by seizing property that has been forfeited to (and therefore is owned by) the United States. Petitioner may still assess income and other

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[7] Petitioner's assertion (Pet. 6, 9) of a conflict with the Colorado Supreme Court's decision in *In re Interrogatories of the U.S. District Court: United States v. Wilkinson*, discussed in note 4, *supra*, likewise is without merit. That case involved the construction of the *state* nuisance law providing for forfeiture. Petitioner's reliance (Pet. 8, 9) on *United States* v. *Wingfield*, also discussed in note 4, *supra*, is misplaced for the same reason.

taxes against Albert Levy and execute its tax lien against other property. Cf. *Raulerson* v. *United States*, 786 F.2d 1090, 1091 (11th Cir. 1986) (if property is forfeited criminally or civilly under Title 21, the government may seize additional assets to satisfy a jeopardy tax assessment).

Petitioner asserts (Pet. 8, 10-11), however, that the decision below conflicts with an earlier decision of this Court, *United States* v. *City of New Britain*, 347 U.S. 81 (1954), concerning state tax liens. *New Britain* involved the interpretation of the provision of the federal tax code that assigns priority to state and federal tax liens. The Court determined that under the relevant provision in the tax code, a previously filed state tax lien takes priority over the federal tax lien. That decision is irrelevant in this case, which involves a different federal statute, 21 U.S.C. 881(a)(6) (1976 Supp. V 1981). Moreover, the United States' right to the property at issue here is not based on a mere lien to satisfy a separate claim, but instead is based on the United States' paramount title to the property, which was conveyed to it by operation of law upon the commission of the act giving rise to forfeiture. That result does not prejudice the citizens of Colorado, because the Attorney General, pursuant to statutory provisions in which Congress recognized the interest of the States in utilizing the proceeds of drug trafficking for law enforcement purposes, transferred most of the proceeds realized by the United States in this case to law enforcement agencies in Colorado.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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